

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

DARRYL L. PALMER, ) CASE NO.: C06-1075-JCC  
Petitioner, )  
v. ) REPORT AND RECOMMENDATION  
BENEDICT MARTINEZ, )  
Respondent. )  
\_\_\_\_\_)

## INTRODUCTION

Petitioner Darryl L. Palmer proceeds *pro se* and *in forma pauperis* in this 28 U.S.C. § 2254 action. (Dkt. 1.) Respondent submitted an answer, arguing that petitioner's § 2254 petition should be dismissed with prejudice. (Dkt. 16.) Petitioner submitted a response to that answer. (Dkt. 19.) Having reviewed the record in its entirety, including the state court record, the Court recommends that the petition be dismissed with prejudice.

## **BACKGROUND**

Petitioner challenges his September 21, 2001 conviction by guilty plea to assault in the first degree (Count One) and assault of a child in the second degree (Count Two). (Dkt. 18, Ex. 1.) The King County Superior Court sentenced petitioner to an exceptional sentence of 220

01 months on Count One and a concurrent standard-range sentence of 75 months on Count Two.  
 02 (*Id.* at 4.)

03 In March 2002, petitioner appealed his conviction to the Washington Court of Appeals,  
 04 arguing that the trial court erred in imposing an exceptional sentence. (Dkt. 18, Ex. 4.) The  
 05 Washington Court of Appeals affirmed the exceptional sentence. ( *Id.*, Ex. 3.) Petitioner  
 06 petitioned for review in the Washington Supreme Court in October 2002. ( *Id.*, Ex. 6.) The  
 07 Washington Supreme Court denied review on April 29, 2003. ( *Id.*, Ex. 7.) The Washington  
 08 Court of Appeals issued its mandate on May 15, 2003. ( *Id.*, Ex. 8.)

09 On November 10, 2003, petitioner filed a motion to vacate his sentence in King County  
 10 Superior Court, asserting ineffective assistance of counsel. (*Id.*, Ex. 16.) The trial court denied  
 11 the motion to vacate. ( *See id.* , Ex. 18.) On August 30, 2004, petitioner appealed in the  
 12 Washington Court of Appeals. (*Id.*, Ex. 9.) He argued that the exceptional sentence violated his  
 13 Sixth Amendment rights and was contrary to the United States Supreme Court decisions in  
 14 *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000),  
 15 and that the trial court violated his right to appointment of counsel under Washington Superior  
 16 Court Criminal Rule 3.1. (*Id.* at 1-4.) The Washington Court of Appeals denied the appeal. (Dkt.  
 17 18, Ex. 12.) The Washington Supreme Court subsequently denied a petition for review *Id.*, Exs.  
 18 13 & 14.) The Washington Court of Appeals issued its mandate on June 27, 2006. (*Id.*, Ex. 15.)

19 DISCUSSION

20 Petitioner raises three grounds for relief in this habeas action, accurately summarized by  
 21 respondent as follows:

22 1. The exceptional sentence is invalid.

- (a) The sentence violates Blakely v. Washington.
- (b) There was insufficient evidence to support the exceptional term because evidence did not expressly quantify the trauma that the child suffered by being present during the assault on his mother.

2. The State breached the plea agreement by arguing in favor of the exceptional sentence on appeal.

3. The State violated the separation of powers doctrine by advocating for the exceptional sentence on appeal.

(Dkt. 16 at 3-4.) Respondent argues that petitioner failed to exhaust the second part of his first ground for relief and the entirety of his second and third grounds, and that those claims are now barred. Respondent further argues that the first part of petitioner's first ground for relief fails because *Blakely* does not apply retroactively to cases on collateral review. For the reasons described below, the Court agrees with respondent.

## Exhaustion and Procedural Bar

“An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State.” 28 U.S.C. § 2254(b)(1)(A). The exhaustion requirement “is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts,” and, therefore, requires “state prisoners [to] give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process.” *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

A complete round of the state's established review process includes presentation of a petitioner's claims to the state's highest court. *James v. Borg*, 24 F.3d 20, 24 (9th Cir. 1994).

01 However, “[s]ubmitting a new claim to the state’s highest court in a procedural context in which  
02 its merits will not be considered absent special circumstances does not constitute fair  
03 presentation.” *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994) (citing *Castille v. Peoples*,  
04 489 U.S. 346, 351 (1989)). Consequently, presentation of a federal claim for the first time to a  
05 state’s highest court on discretionary review does not satisfy the exhaustion requirement. *Castille*,  
06 489 U.S. at 351; *Casey v. Moore*, 386 F.3d 896, 915-18 (9th Cir. 2004), *cert. denied* 125 S.Ct.  
07 2975 (2005). *But see Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) (“If the last state court to  
08 be presented with a particular federal claim reaches the merits, it removes any bar to federal-court  
09 review that might otherwise have been available.”)

10 Additionally, a petitioner must “alert the state courts to the fact that he was asserting a  
11 claim under the United States Constitution.” *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir.  
12 1999) (citing *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995)). “The mere similarity between a  
13 claim of state and federal error is insufficient to establish exhaustion.” *Id.* (citing *Duncan*, 513  
14 U.S. at 366). “Moreover, general appeals to broad constitutional principles, such as due process,  
15 equal protection, and the right to a fair trial, are insufficient to establish exhaustion.” *Id.* (citing  
16 *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996)).

17 Pursuant to RCW 10.73.090, no petition or motion for collateral attack on a judgment and  
18 sentence in a criminal case may be filed more than a year after the judgment becomes final.  
19 Additionally, if the state court expressly declined to consider the merits of a claim based on an  
20 independent and adequate state procedural rule, or if an unexhausted claim would now be barred  
21 from consideration by the state court based on such a rule, a petitioner must demonstrate a  
22 fundamental miscarriage of justice, or cause, *i.e.* some external objective factor that prevented

01 compliance with the procedural rule, and prejudice, *i.e.* that the claim has merit. *See Coleman v.*  
 02 *Thompson*, 501 U.S. 722, 735 n.1, 749-50 (1991); *Harris v. Reed*, 489 U.S. 255, 263 (1989).

03 In this case, petitioner did not exhaust the second part of his first ground for relief and the  
 04 entirety of his second and third grounds. Although he raised the third ground as a federal  
 05 constitutional violation in the Washington Supreme Court, he failed to raise that claim in the  
 06 Washington Court of Appeals. (Dkt. 18, Exs. 4 & 6.) Because petitioner raised this claim for  
 07 the first time in the Washington Supreme Court on discretionary review, it remains unexhausted.  
 08 *See Castille*, 489 U.S. at 351; *Casey*, 396 F.3d at 915-18. Also, petitioner failed to raise either  
 09 the second part of his first ground for relief or the second ground for relief as federal constitutional  
 10 violations in either state court. (Dkt. 18, Exs. 4 & 6.) (*See also id.*, Exs. 9, 13 & 16.) Because  
 11 it has been more than one year since petitioner's conviction became final (*see id.*, Ex. 8), and  
 12 because petitioner fails to establish either cause or prejudice excusing his procedural default, these  
 13 claims are procedurally barred by RCW 10.73.090.

14 *Blakely v. Washington*

15 This Court's review of the merits of petitioner's claims is governed by 28 U.S.C. §  
 16 2254(d)(1). Under that standard, the Court cannot grant a writ of habeas corpus unless a  
 17 petitioner demonstrates that he is in custody in violation of federal law and that the highest state  
 18 court decision rejecting his grounds was either "contrary to, or involved an unreasonable  
 19 application of, clearly established Federal law, as determined by the Supreme Court of the United  
 20 States." 28 U.S.C. § 2254(a) and (d)(1). The Supreme Court holdings at the time of the state  
 21 court decision will provide the "definitive source of clearly established federal law[.]" *Van Tran*  
 22 *v. Lindsey*, 212 F.3d 1143, 1154 (9th Cir. 2000), *overruled in part on other grounds by Lockyer*

01 *v. Andrade*, 538 U.S. 63 (2003). A state-court decision is contrary to clearly established  
 02 precedent if it “applies a rule that contradicts the governing law set forth in” a Supreme Court  
 03 decision, or “confronts a set of facts that are materially indistinguishable” from such a decision  
 04 and nevertheless arrives at a different result. *Early v. Packer*, 537 U.S. 3, 8 (2002) (quoting  
 05 *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000)).

06 As reflected above, petitioner argues the invalidity of his sentence under *Blakely*.  
 07 Respondent counters that *Blakely* does not apply because petitioner’s direct appeal was no longer  
 08 pending at the time of that decision and because the Supreme Court has not made the decision  
 09 retroactive to cases on collateral review. *See Schardt v. Payne*, 414 F.3d 1025, 1033, 1036 (9th  
 10 Cir. 2005). Petitioner concedes that *Blakely* only became a possible argument during the collateral  
 11 attack on his conviction, but argues the applicability of *Apprendi*, which expressed the rule later  
 12 applied in *Blakely*. *See Blakely*, 542 U.S. at 303 (citing *Apprendi*, 530 U.S. at 490).

13 On June 26, 2000, the United States Supreme Court issued its opinion in *Apprendi*,  
 14 holding: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime  
 15 beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a  
 16 reasonable doubt.” 530 U.S. at 490. It was not until the June 24, 2004 *Blakely* decision,  
 17 however, that the Supreme Court clarified that “the ‘statutory maximum’ for *Apprendi* purposes  
 18 is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury*  
 19 *verdict or admitted by the defendant.*” 542 U.S. at 303 (emphasis in original; citing *Apprendi*, 530  
 20 U.S. at 490). “In other words, the relevant ‘statutory maximum’ is not the maximum sentence a  
 21 judge may impose after finding additional facts, but the maximum he may impose *without* any  
 22 additional findings.” *Id.* at 303-04. The *Blakely* Court concluded that the exceptional sentence

01 at issue in that case, which exceeded the top end of the standard sentencing range under the  
02 Washington Sentence Reform Act, violated the Sixth Amendment because the facts supporting  
03 the exceptional sentence were neither admitted by petitioner, nor found by a jury. *Id.* at 301-05.  
04 As noted by respondent, in *Schardt*, the Ninth Circuit found that *Blakely* did not apply  
05 retroactively to a conviction that was final before the announcement of the *Blakely* decision. 414  
06 F.3d at 1033, 1038 (finding *Blakely* did not apply because defendant's direct appeal was no longer  
07 pending at the time *Blakely* was decided).

08 In this case, petitioner clearly pursues a claim pursuant to the Supreme Court's holding in  
09 *Blakely*. (See Dkt. 1 at 3-3B and Dkt. 19 at 2-4.) The Court finds no basis for petitioner's  
10 apparent argument that the holding in *Blakely* should apply retroactively to cases pending at the  
11 time of the *Apprendi* decision. (See Dkt. 18, Ex. 13 at 5-8 (making this argument before the  
12 Washington Supreme Court.)) Instead, because *Blakely* does not apply retroactively, the first part  
13 of petitioner's first ground for relief necessarily fails.

14 CONCLUSION

15 For the reasons described above, petitioner's habeas petition should be denied and this  
16 action dismissed with prejudice. No evidentiary hearing is required as the record conclusively  
17 shows that petitioner is not entitled to relief. A proposed order accompanies this Report and  
18 Recommendation.

19 DATED this 8th day of January, 2007.

20   
21 Mary Alice Theiler  
United States Magistrate Judge  
22